

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Telecommunications Relay Services,
and Speech-to-Speech Services for
Individuals with Hearing and Speech
Disabilities

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CG Docket No. 03-123

PETITION FOR CLARIFICATION AND DECLARATORY RULING
ON COMMUNICATIONS ASSISTANT TRANSPARENCY

March 9, 2010

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I. Requested Action

Hearing Loss Association of America (“HLAA”), Hearing Loss Association of California (“HLA-CA”), California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH), Deaf and Hard of Hearing Consumer Advocacy Network (“DHHCAN”), National Association of the Deaf (“NAD”), California Association of the Deaf (“CAD”), and Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”) (collectively “Consumer Groups” or “Petitioners”), hereby submit this petition to the Federal Communications Commission (“FCC” or “Commission”) seeking clarification and a declaratory ruling that it is impermissible for any state to require communications assistants (“CAs”) to announce their presence on captioned telephone relay service (“CTS”) calls.¹ In furtherance of this principle, if the Commission deems it necessary, Petitioners request the FCC to amend 47 C.F.R. § 64.604(a)(2) by adding the following provision:

(iii) A CA shall not be required to disclose his or her presence to the parties of a TRS call, notwithstanding state or local law to the contrary.

Petitioners further seek a ruling to specifically establish that Section 6.12.4.1 of the California Public Utility Commission (“CPUC”) Request for Proposals (“RFP”), which imposes this disclosure requirement beginning in July 2010 – when California starts offering this service to its residents on a non-trial basis – violates the American with Disabilities Act’s (“ADA’s”) mandate for telecommunications relay services (“TRS”) to be functionally equivalent to conventional voice telephone services.²

II. Background

The CPUC first announced its intention to impose a CA announcement requirement in

¹ Although this petition specifically deals with CTS calls, this principle should apply for any form of telecommunications relay service calls.

² 47 U.S.C. § 225(a)(3). *See also* S. Rep. No. 116, 101st Cong., 1st Sess. 77 (1989), discussing the requirement for functional equivalency.

January 2009, when it issued its RFP detailing the specifications for its state's telecommunications relay program. Included within those specifications was a requirement for CTS providers to inform all parties to a CTS call, by text and voice messages, that a CA is participating in the call.³ Although California has been operating a CTS trial since 2002 without this disclosure requirement, the state now alleges that the new obligation is needed to ensure compliance with local mandates protecting the privacy of telephone communications in California. Those mandates, contained in the California Invasion of Privacy Act, Penal Code section 630 *et. seq.*, include a number of prohibitions against the eavesdropping, monitoring, recording and disclosing of a telephone conversation unless all parties to the call have given their consent to such activities.

On March 23, 2009, various Consumer Groups representing CTS users submitted a Request for Intervention and Modification to the CPUC to express their strong opposition to the inclusion of the CPUC's new announcement requirement.⁴ The Consumer Groups' Request disagreed with the CPUC's conclusion that the actions of any California relay service could constitute illegal wiretapping, eavesdropping, monitoring, recording, or transcribing merely by failing to announce the CAs' presence, and it sought deletion of the offending provision. Although no official response to the Consumer Groups' Request has been received, on September 1, 2009, the California Attorney General ("AG") issued an Opinion upholding the validity of the disclosure clause, which contained the following findings:

³ Section 6.12.4.1 "Disclosure of CA Participation in CTS Conversations," California Public Utilities Commission Request for Proposal 08PS5800 for California Relay Services, CPUC Document 368851 (January 21, 2009), attached as Appendix A.

⁴ Request for Intervention and Modification, filed by the California Coalition of Agencies Serving the Deaf and Hard of Hearing, Inc., Hearing Loss Association of California, National Association of the Deaf, Telecommunications for the Deaf and Hard of Hearing, Inc., Association of Late-Deafened Adults, and Hearing Loss Association of America ("Consumer Groups"), attached as Appendix B ("Consumer Groups' Request").

- The language of California Penal Codes Sections 631, 632 and 632.7 prohibits a person from listening to a telephone call without the consent of all parties to the call.
- The express intent of the California Legislature is to protect privacy rights in telecommunications.
- The courts have interpreted the provisions of the California Invasion of Privacy Act broadly enough to apply to relay calls.
- The California Legislature intended for both parties to a call to consent to the presence of a third party on the call.
- A CA is a non-party intermediary who relays the call on behalf of one party to the call.
- The statutory exceptions to the Privacy Act do not permit a CA to listen to a relay call without the consent of all parties to that call.⁵

The specific provisions being used by California to impose the CA announcement requirement are:

California Penal Code 631(a). “Any person who . . . willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within this state; or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained . . . is punishable by a fine . . . or by imprisonment . . . or by both . . .”

California Penal Code 632(a). “Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine . . . or imprisonment . . . or by both . . .”

California Penal Code 632(c). “The term ‘confidential communication’ includes communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto . . .”

California Penal Code 632.7(a). “Every person who, without the consent of all parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication transmitted

⁵ Letter from Edmund G. Brown, Jr., California Attorney General, State of California Department of Justice to Sindy J. Yun, Staff Counsel, California PUC (September 1, 2009) (“AG Opinion”), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020244324>.

between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone, shall be punished by a fine . . . or by imprisonment . . . or by both . . .”⁶

Based on the above provisions, the AG concluded that the presence of a CA on a telephone call without the consent of both parties violates the California Invasion of Privacy Act, and that neither Section 225 of the Communications Act, nor any prior actions by the FCC, preempt the RFP’s announcement requirement. On this last point, the AG opined that because the FCC’s mandatory minimum standards governing the scope of functional equivalency neither relate to nor conflict with the disclosure requirement, “the objective of the ADA is not undermined by the consent provisions.”⁷

Consumer Groups disagree with the AG’s analysis and conclusions. As will be shown below, it is abundantly clear that the FCC’s various orders approving CTS – as well as the

⁶ In addition to the above provisions, the AG Opinion also referenced California Penal Code 637. That section reads in pertinent part: “Every person not a party to a . . . telephonic communication who willfully discloses the contents of a . . . telephonic message . . . addressed to another person, without the permission of such person, unless directed to do so by the lawful order of a court, is punishable by imprisonment . . . or by fine . . . or by both . . .” Finally, although not cited for support by the AG, the CPUC also relied on California PUC General Order 107-B as justification for its announcement requirement. That provision requires telephone corporations to maintain records of instances in which employees discover devices installed for the purpose of “overhearing communications over the lines of such corporation.” State rules promulgated under this section prohibit the monitoring or recording of telephone conversations, except where all parties to a conversation give their express prior consent or when notice that such monitoring or recording is given to the parties to the conversation. Monitoring is defined as “the use of monitoring equipment to allow a third person to overhear the telephone conversation of two or more persons.” Monitoring does not include the “unintentional interception of telephone conversations by telephone utility personnel engaged in normal operation, maintenance or construction.” Recording is defined as “recording or transcribing of any telephone conversation by means of any electronic device.” However, the AG determined that there was no violation of Penal Codes Sections 632.5 and 632.6 because these sections (which also prohibit the interception of conversations transmitted between cell phones and cordless phones without the consent of all parties to the conversation) require malicious intent. AG Opinion at 5.

⁷ AG Opinion at 18.

Commission’s mandatory minimum standards governing the nature of a CA’s role – already firmly establish the need for complete transparency during a CTS call. However, because the AG’s Opinion appears to seek a *specific FCC prohibition* against a CA disclosure requirement, Consumer Groups request the Commission to unequivocally clarify that requiring CTS CAs to announce themselves would be in direct opposition to the history, purpose, and text of FCC rules governing TRS, all of which have consistently directed the provision of relay services to be as transparent as conventional voice telephone services. Additionally, if the Commission deems it necessary to address the AG’s request for an explicit ruling on this point, the FCC should make the following addition to 47 C.F.R. § 64.604(a)(2):

(iii) A CA shall not be required to disclose his or her presence to the parties of a TRS call, notwithstanding state or local law to the contrary.

III. Communications Assistants are Transparent Conduits

A. FCC Policies and Regulations Affirm the Invisible Role of a CA

The ADA’s requirement for functional equivalency has served as the touchstone for determining how TRS providers must provide services to consumers: the goal is to ensure that the features, functions, and capabilities of these services mirror voice telephone services as closely as possible. Over the past 20 years, the FCC has developed a series of intricate rules, including requirements, guidelines, and operational procedures, which seek to achieve such functional equivalency. Among other things, these rules specify the required skills of a CA;⁸ require CAs to transmit conversations verbatim and in real time;⁹ and prohibit CAs from

⁸ 47 C.F.R. § 64.604(a)(1).

⁹ 47 C.F.R. §§ 64.604(a)(1) and (2)(ii). These federal standards and confidentiality requirements are prescribed by the RFP itself in sections 4.3.1, 6.1.4, and 6.6.2, as well as the ADA compliance certification in section 11.

“intentionally altering a relayed conversation,”¹⁰ refusing calls or limiting the length of any relayed calls,¹¹ “keeping records of the content of any conversation beyond the duration of the call,”¹² and “disclosing the content of any relayed conversation.”¹³ All of these rules attest to the neutral and objective role played by CAs, who are intended to operate as invisible extensions of the telephone network, not as third or interested parties to a call.

From its very first ruling governing TRS in 1991, the FCC has been consistent in its characterization of CAs as a “transparent conduit” (rather than a “third party” on a “non-party intermediary”) to the relay call.¹⁴ All rulings addressing this matter also have equated establishing a connection to a CA with accessing a dial tone. For example, in its March 2000 ruling, the FCC explained that “reaching a CA ready to place the relay call is equivalent to getting a dial tone when picking up the phone. Thus, this portion of the call is the first crucial step to making the TRS calling experience functionally equivalent to placing a voice call”¹⁵ In 2004, the FCC further explained that the

guidepost for the provision of TRS – that the relay service should be “functionally equivalent” to voice telephone service – means, as we have stated, that the CA “serves as a *transparent conduit* between two people communicating through disparate modes.” In other words, the CA’s role is simply to convert typed (or signed) messages into voice messages, and vice versa, so that the parties to the call can communicate back and forth, as any parties to a telephone call would do. It is because of this limited, transparent role of the CA that we have frequently stated that completion of

¹⁰ 47 C.F.R. § 64.604(a)(2)(ii).

¹¹ 47 C.F.R. § 64.604(a)(3).

¹² 47 C.F.R. § 64.604(a)(2)(i).

¹³ *Id.*

¹⁴ *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, Report and Order and Request for Comments, CC Dkt. 90-571, FCC 91-213, 6 FCC Rcd 4657 (July 26, 1991) (“First Report and Order”).

¹⁵ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, CC Dkt. 98-67, FCC 00-56, 15 FCC Rcd 5140 (March 6, 2000) at ¶170. The FCC relied upon this reasoning to reduce delays experienced by relay users when placing calls through relay services. See also *id.* at ¶60.

the initial call to the TRS facility, and connecting to a CA, is equivalent to receiving a dial tone.¹⁶

Consistently and unequivocally, the FCC has confirmed in all contexts that CAs are not third parties who can make independent judgments or “listen in” for their own benefit on relayed calls.¹⁷ Most telling on this point was the FCC’s 2004 response to concerns by medical personnel about potential conflicts between the use of relay services and prohibitions against third party involvement in medical situations under the Health Insurance Portability and Accountability Act (“HIPAA”).¹⁸ Because HIPAA disallows the disclosure of health information without the patient’s consent, some health professionals had raised concerns that discussing health related information via TRS created “a possible violation of the Privacy Rule because a ‘third party,’ the TRS CA, hears the information being discussed as the call is relayed.”¹⁹ To eliminate any potential violation of HIPAA, these professionals were demanding that CAs sign disclosure forms (generally called “business associate contracts”)

¹⁶ *Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, CC Dkts. 90-571, 98-67; CG Dkt. 03-123, FCC 04-137, 19 FCC Rcd 12475 (June 30, 2004) at ¶154 (citations omitted).

¹⁷ In 2005 and again in 2006, the FCC stated that the “first step for the TRS user, the completion of the outbound call to the TRS provider, is the equivalent to reaching a “dial tone.” *Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Order on Reconsideration, CG Dkt. No. 03-123, FCC 05-203 (December 12, 2005) at ¶3, n.12; *Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling and Further Notice of Proposed Rulemaking, CG Dkt. No. 03-123, FCC 06-57 (May 9, 2006) at (¶10). In the latter case, the Commission explained that it was not permissible for one relay provider to block access to competing VRS providers under Section 225’s functional equivalency mandate, because “[v]oice telephone users reach a dial tone almost instantaneously every time they pick up the telephone. For TRS users, the Commission has recognized that reaching a CA ready to handle the call is essentially the same as reaching a dial tone.” *Id.* at ¶30.

¹⁸ HIPAA is contained at Pub. L. No. 104-191, 110 Stat. 1936 (1996).

¹⁹ *Clarification of the Use of Telecommunications Relay Services and HIPAA*, FCC Public Notice, DA 04-1716, 19 F.C.C.R. 10677 (2004) (June 14, 2004).

before they would be allowed to use TRS to convey medical information to and from patients. The Commission struck down the need for such disclosure agreements, ruling that all forms of TRS could be used to facilitate calls between health care professionals and patients without violating HIPAA.²⁰

More recently, in its order directing Internet-based relay providers to issue ten-digit numbers to all relay users, the FCC again spoke of the obligation placed on TRS providers to “handle calls consumers choose to make, when they choose to make them, *i.e.*, to be the ‘dial tone’ for a consumer that uses relay to call to a voice telephone user”²¹ This – and virtually every FCC ruling that preceded it – has confirmed that CAs do not constitute third parties or intermediaries that have any interest or involvement in the calls they relay. Accordingly, by no stretch of the imagination can CAs be said to be “eavesdropping” or otherwise monitoring these conversations.

²⁰ *Id.*

²¹ *Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities, E911 Requirements for IP-Enabled Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, CG Dkt. No. 03-123, WC Dkt. No. 05-196, FCC 08-151 (2008) at ¶145.

B. The Federal Judiciary has Affirmed The Invisible Role of a CA

Not only has the CA's active participation in TRS calls been refuted by the various FCC orders and regulations discussed above, the CA's unobtrusive role has also been affirmed by a U.S. Court of Appeals. Specifically, in a case decided on September 12, 2008, *Germano v. International Profit Association*, the U.S. Court of Appeals for the Seventh Circuit held that statements transmitted by a CA during a TRS call are not hearsay (and are therefore admissible) because a CA is "no more than a language conduit" who "simply reads out the English words from the text she sees, and then types in the English words from the voice she hears."²² According to the *Germano* court, various characteristics of relay services contributed to the transparency of the CA in this employment discrimination case. These included the random selection of the CA, the lack of motive by the CA to mislead, to distort or to transmit statements inaccurately (because she had no prior relationship with either of the parties to the call), and the likelihood that CAs in general are reliable because their qualifications and language skills are prescribed by federal regulations.

The *Germano* court also relied on the following express FCC requirements to sustain its ruling that statements made through a CA should be treated as if the applicant and employer had spoken to each other directly by phone for purposes of their admissibility:

- the prohibition against CAs "intentionally altering a relayed conversation,"²³
- the requirement for CAs to "relay all conversations verbatim,"²⁴
- the prohibition against CAs "keeping records of the content of any conversation beyond the duration of the call"²⁵ and
- the prohibition against CAs "disclosing the content of any relayed conversation."²⁶

²² 544 F.3d 798 at 803 (7th Cir. 2008).

²³ 47 C.F.R. § 64.604(a)(2)(ii).

²⁴ *Id.*

²⁵ 47 C.F.R. § 64.604(a)(2)(i).

Finally, the court relied on the ADA's "strong policy reasons" in deciding to admit testimony about the content of the TRS conversation that took place between a deaf job applicant and his potential employer:

Congress mandated the creation of a telecommunications system for persons with hearing and speech disabilities that is "functionally equivalent" to those used by nondisabled persons. 47 U.S.C. § 225. Denying the admissibility of statements made during a TRS conversation would strip those with hearing disabilities of a vital source of evidence available to hearing persons. Deaf persons could not conduct important day-to-day affairs over the phone, such as calling the bank or the doctor, with the same ability to rely on the statements made to them by the other party that is enjoyed by hearing persons. Such a result is at odds with Congress's intent to make disabled persons full and equal participants in society. 42 U.S.C. § 12101(a)(8).²⁷

In part, the *Germano* court was guided by cases involving foreign language interpreters, which have consistently held such interpreters to be no more than "language conduits." Those courts employed language remarkably similar to that used to describe the role that CAs play in relaying communications. For example, in *Commonwealth v. Vose*,²⁸ the court explained that when two people who cannot understand each other communicate through an interpreter, "they choose a mode of communication, they enter into conversation, and the words of the interpreter, which are their necessary medium of communication, are adopted by both, and made a part of their conversation as much as those which fall from their own lips."²⁹

²⁶ *Id.*

²⁷ *Germano*, 544 F.3d at 804.

²⁸ 32 N.E. 355 (Mass. 1892).

²⁹ *Germano*, 544 F.3d at 802 citing *Lee v. United States*, 198 F. 596 (7th Cir. 1912) quoting *Vose*, 32 N.E. at 355. The *Germano* court went on to cite the opinions of various other circuits to support this ruling. For example, the Second Circuit has explained that "an interpreter is 'no more than a language conduit and therefore his translation [does] not create an additional level of hearsay.'" *United States v. Lopez*, 937 F.2d 716, 724 (2d Cir. 1991) (quoting *United States v. Koskerides*, 877 F.2d 1129, 1135 (2d Cir. 1989) (brackets in original)). Also analogous is the case of *United States v. Dempsey*, where the court had to decide whether a defendant had been denied a fair trial just because a deaf juror had used a

What the *Germano* court recognized is that, by their very definition, CAs are not placed on calls to participate in any way other than to transparently relay the conversation between the parties of those calls. As are all CAs, CTS CAs are under a strict FCC mandate to relay conversations verbatim, in real-time – they must literally re-voice words at the exact time that they are spoken by the captioned telephone user – and so there is no way that they can be considered independent third parties or even “non-party intermediaries” that might be eavesdropping, monitoring, or making any willful attempts to learn the content or meaning of the communication that they relay.

IV. The Transparency Created by Captioned Telephone Relay Services Allows a Heightened Level of Functional Equivalency

The advancements made available through CTS technology have provided individuals who rely upon this form of relay service with even greater functional equivalency than previously possible with other forms of TRS. On multiple occasions, the FCC has recognized that CTS operates more like a conventional telephone service, is less intrusive, and is more natural for its call participants than many other forms of relay. As a result, CTS has enabled thousands of Americans to remain independent, productive and connected. Most importantly, CTS has filled a void for certain segments of the population, including people who have lost their hearing later in life, that was not being filled by other relay options. This is because CTS users want to be able to use the telephone like they always have and like all other

sign language interpreter in the jury room. Ruling that a fair trial had been provided, the court explained that although the interpreter constituted a thirteenth person in the room, that individual was only there to interpret, and society has “come to view such interpreters more as part of the background than as independent participants.” 830 F.2d 1084, 1091-2 (10th Cir. 1987). The *Dempsey* court understood, as did Congress in enacting the ADA, the importance of allowing third parties to perform this background role in order to assist people who are deaf and hard of hearing to communicate with other individuals. *See also United States v. Beltran*, 761 F.2d 1, 9 (1st Cir. 1985).

hearing people do – without the active involvement of the CA. But this major benefit that CTS offers will be severely compromised if CAs are forced to announce themselves.

The FCC recognized this when it first approved CTS in 2003 and noted the ability of CTS CAs to be completely transparent during the set up and transmission of each call. At that time, the FCC lauded the fact that this service eliminated the need for the CA to speak or interact with either party as a critical attribute of this service, especially for individuals who were previously reluctant to use prior forms of TRS:

The captioned telephone user does not need to dial an 800 or 711 exchange to reach the TRS facility and set up the call, nor is there any interaction with the CA (by either party to the call). . . . Throughout the call the CA is completely transparent and does not participate in the call by voicing any part of the conversation.³⁰

. . . Captioned telephone VCO service offers consumers the benefit of operating more like conventional voice telephone service, with direct dialing of the called party's number and the nearly simultaneous delivery of the actual voice of the called party and written text of what the called party has said as generated by the CA re-voicing the message. The record reflects that it is less intrusive and more natural for the call participants, and that users who become hearing impaired later in life may find it easier to adjust to captioned telephone VCO service than to traditional TRS services. Therefore, captioned telephone VCO service will reach a segment of the population that has traditionally not been well serviced by current TRS options.³¹

In this Declaratory Ruling, the FCC specifically entertained and *rejected* a proposal that would have allowed CTS CAs to interrupt the conversation because this would “interfere with the natural flow of the conversation and largely defeat one of the central features of the captioned telephone VCO service, *i.e.*, that the CA is transparent during the set-up and throughout the call.”³²

As further testament to the invisibility of the CA in CTS calls, in that same order, the FCC went on to waive the FCC requirement – applicable to all other forms of TRS – requiring

³⁰ *Captioned Telephone Declaratory Ruling* at ¶4.

³¹ *Id.* at ¶16.

³² *Id.* at ¶50.

relay providers to accommodate requests for CAs of a certain gender.³³ The FCC explained that because CTS service is designed so that the user directly calls the other party, the transparency of the CA “would be defeated if gender preference had to be accommodated.”³⁴

The Commission’s insistence that CTS is a service that is largely defined by its transparency resonated as well in the FCC’s approval of the Internet Protocol (“IP”) based form of captioned telephone relay service. Describing the IP version, the Commission reiterated its expectation that

the new service will be provided in a way that is automated and invisible to both parties to the call. For example, presently with captioned telephone service the consumer does not communicate directly with a CA to set up the call; similarly, we expect that IP captioned telephone service should permit the consumer to directly dial the called party and then automatically connect the CA to the calling party to deliver the captions.³⁵

What all of this amounts to is the FCC’s general expectation that CTS users be able to speak to each other just as if they were not using a relay service at all. The CTS CA does not have any relationship with, nor interest in the users for whom she or he is relaying conversations. Nor is the CA “listening” in on CTS conversations as an interested party, contrary to suggestions by the California AG.³⁶ Rather, as emphasized so many times by the

³³ *Id.* at ¶47.

³⁴ *Id.* at ¶48.

³⁵ *Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities, Internet-based Captioned Telephone Service*, Declaratory Ruling, CG Dkt No. 03-123, FCC 06-182 (January 11, 2007) at ¶23.

³⁶ See AG Opinion at 7: “We conclude that a relay program that permits a CA to overhear an entire telephone call without notice to all parties to the conversation violates the consent requirement in Penal Code sections 631, 632, and 632.7. This conclusion is based in part on the fact that the plain language of these sections ‘prohibit[] a person from *listening* to a telephone call without the consent of all parties to the call’” (emphasis added). See also the AG Opinion’s reference to *Ribas v. Clark*, *infra*, in which the California Supreme Court held that the Penal Code section 631 “prohibited *listening* on an extension telephone without the consent of all participants.” AG Opinion at 12 (emphasis added). Equally inapposite is the case of *Warden v. Kahn*, 99 Cal. App. 3d 805 (1979), in which a blind person secretly

Commission, the CA is there only as a transparent conduit who plays no role in the conversation other than to re-voice what he or she hears, so that this can be converted simultaneously, via speech recognition, into text.³⁷ It is this attribute – complete CA transparency – that both consumers and the FCC have recognized as being pivotal to achieving functional equivalency. This is particularly true for the vast majority of CTS users, who have lived their lives accustomed to using conventional voice telephones. The resistance to other forms of relay service by this population was in part owing to the invasiveness of those services in their telephone conversations. Requiring a CA to disclose to the call recipient that relay services are being provided significantly reduces the benefits of this service for its users by making the CA take a more conspicuous role in the call.

Requiring a CA to announce him or herself also increases the likelihood of having the receiving party to the call hang up on the CTS caller. Since the inception of relay services, all too often businesses, governmental agencies, and others have rejected relay calls, erroneously believing these calls to be related to product marketing or of a similar nature.³⁸ The increased incidence of overseas fraudsters using IP-based relay services to masquerade as purchasers of large quantities of goods has increased such hang-ups in recent years. In order to prevent their calls from being rejected, providers of all forms of TRS are reporting a significant increase in requests from relay users not to announce the presence of either the CA or the

recorded telephone calls he had with his attorney. In that case, the person making the recording both knew the other party to the call and had an interest in acquiring and keeping the contents of the call.

³⁷ Note that the only reason that a human is needed to convert speech into text is that current speech recognition systems are unable to automatically complete this function with the requisite accuracy. A CA must first “train” the speech recognition program to understand the intonations, inflections and other patterns of his or her speech to achieve high accuracy.

³⁸ *Telecommunications Relay Services, the Americans with Disabilities Act of 1990, and the Telecommunications Act of 1996*, 12 F.C.C.R. 1152, 1169 (Jan. 14, 1997).

relay service.³⁹ Thus, it has become quite common for hearing people to become parties to all forms of TRS calls without having any knowledge that a relay service is being used.

Even the CPUC recognizes the benefit to relay users of being in control of their own phone calls. Section 6.9.7 of the very same RFP that requires CTS CAs to disclose their presence allows users of other forms of TRS to request that the CA not announce the call:

Upon request by the user, the CA shall not announce a call as a relay call, permitting the caller to provide explanation, if any. The CA shall not have the option to inform the called party that the caller is deaf or speech disabled unless the caller asks the CA to do so.

A similar provision allows a TTY relay user to request the opportunity to introduce relay services to the called party, rather than have the CA make that introduction.⁴⁰ Allowing one group of TRS users to achieve CA transparency while denying this right to CTS users is not only inconsistent with California's own justifications for imposing the consent requirement; it is discriminatory against CTS users.⁴¹

When a business or government agency does not accept a relay call, the caller is denied the ability to access job and educational opportunities, take care of financial affairs, make reservations at restaurants and hotels, or engage in other daily affairs needed to achieve one's independence and privacy. Previous attempts by the FCC to instruct businesses to

³⁹ Video relay service (VRS) is another type of service that achieves simultaneous communication between the parties to a call. If a VRS user requests the video interpreter handling the call not to announce herself, the party receiving the call will, like the party receiving a CTS call, not know that a relay service is in use.

⁴⁰ California RFP section 6.9.5.

⁴¹ In section 6.12.2 of the RFP, the CPUC specifically waives compliance with Section 6.9.7 *only for CTS*. The AG Opinion appears to defend this discrepancy under the theory that traditional TRS calls provide some notice to the called party when the CA either announces himself or asks the called party about familiarity with TRS, or when the called party overhears call center noises including typing. However, the AG Opinion similarly acknowledges that when so requested by a TTY user, the CA must not announce the call. AG Opinion at 3. Indeed, Petitioners maintain that when a caller does make such a request, there is no difference between such a call and a CTS call.

accept relay calls in compliance with their ADA Title III obligations have had limited impact, probably because the mainstream businesses affected are not accustomed to keeping abreast of FCC policy.⁴² The transparency afforded to CTS callers allows such individuals to no longer worry about whether their calls will be accepted or not. Removing this benefit substantially reduces the functional equivalency of this service, in violation of the ADA.

Similarly, as noted by the Consumer Groups in their protest against the California announcement requirement, the CA disclosure mandate violates the privacy of CTS users with hearing loss by unnecessarily disclosing the existence of these individuals' disabilities, opening up the potential for discrimination that the ADA was intended to eliminate. The AG's response, that such disclosure "does not implicate the caller's access to telephone service, which was the purpose of Congress in enacting Title IV," cannot withstand scrutiny.⁴³ To begin with, there is little basis for the AG's statement that calls will not be rejected solely on the basis of a recipient learning that the caller has a disability. To the contrary, it is an unfortunate but true fact that people with disabilities frequently are subject to attitudinal discrimination because of their disabilities. When relay calls are rejected (and we expect that this will continue to happen as it has happened in the past) this significantly impedes the caller's access to telephone service.

Equally important, the AG's assertion ignores entirely the invasive nature of a disclosure requirement. As the Consumer Groups assert, "[m]andating a CTS Relay Provider to take this action is . . . particularly and extremely offensive to the dignity, self-

⁴² See, e.g., *Telecommunications Relay Service (TRS) Providers Must Make All Outbound Calls Requested by TRS Users and May Not "Block" Calls to Certain Numbers at the Request of Consumers*, FCC Public Notice, DA 05-2477 (September 21, 2005).

⁴³ AG Opinion at 19.

determination, independence, and privacy of the person who is deaf or hard of hearing.”⁴⁴

They correctly note that the disclosure provision inappropriately places the alleged privacy interests of other telephone users above the personal privacy interests of individuals who must use CTS to achieve equal telephone access.⁴⁵

V. FCC Policy Protecting Transparency Does not Conflict with California Privacy Interests

The stated intent of the California Legislature in enacting the California Invasion of Privacy Act of the California Penal Code was to “protect the right of privacy” of the people of California by “requiring all parties to a confidential communication to give consent to having the communication listened to or recorded.”⁴⁶ More specifically, the goal was to prevent the invasion of privacy resulting from the *criminal use* of devices and techniques created for the purpose of eavesdropping on private communications and the serious threat this would create to “the free exercise of personal liberties.”⁴⁷ Relay services were not developed for the purpose of eavesdropping – with criminal intent or otherwise – on private communications. Nor are these services ever used for monitoring or recording confidential communications conveyed by telephones. Rather than being a “threat” to the free exercise of personal liberties, these services promote the free exercise of personal liberties by simply converting one form of communication into another (in this case voice to text) for the purpose of making the telephone system accessible to everyone.

Nor is there any legal basis for California to conclude that the failure of a CTS CA to announce the performance of relay duties constitutes the unlawful recording of a

⁴⁴ Consumer Groups’ Request at 15.

⁴⁵ *Id.*

⁴⁶ AG Opinion at 5, citing California Digest of Assembly Bill No. 860.

⁴⁷ California Penal Code § 630.

conversation.⁴⁸ While the transcription of one side of the conversation does take place via speech recognition, it does so for the sole purpose of enabling the CTS user to understand what the other party to the conversation is saying. The terms “recording” and “transcribing” in the context of the California telephone privacy provisions signify the act of keeping a conversation through a tape recording or a writing, not the conversion of one mode of communication to another mode of communication, each of which is conveyed in real-time. Indeed, in the event that one of the parties to the conversation truly wishes to “record” and keep a conversation, it is incumbent upon that individual, not the CA or relay provider, to notify the other party of such intent to record in venues such as California, where unilateral call recording is not permitted. This holds true for any type of relay service, even when the CA’s presence *is* announced to the called party.

Finally there is no cause to suggest that a CA would ever disclose the contents of a call on his or her own.⁴⁹ When a relay call is completed, any and all records of the content of the conversation that took place are erased immediately. As noted above, the FCC’s rules prohibit CAs from keeping records of any conversation beyond the duration of a call.⁵⁰

VI. The Confidentiality Protections Afforded by the FCC are Sufficient to Protect the Privacy Interests of Telephone Subscribers

California seems to acknowledge – to a certain extent – the neutral role played by CAs, as well as the need for caller confidentiality in TRS conversations. The state’s RFP is

⁴⁸ See California Penal Code 632(a), one of the provisions allegedly being violated by the transparency of the CA.

⁴⁹ See California Penal Code 637, another provision allegedly being violated by the transparency of the CA.

⁵⁰ 47 C.F.R. § 64.604(a)(2).

replete with requirements for such confidentiality,⁵¹ and the AG Opinion acknowledges that: (1) CAs are “required to relay calls in a manner that is congruent with the source text and may not interject personal opinion or otherwise participate in the conversation;”⁵² (2) “[c]urrent technology does not allow for the creation of a permanent record of [a CTS] conversation and the text is deleted at the end of the call;”⁵³ and (3) “relay services were not developed for the purpose of eavesdropping on private communications.”⁵⁴ Yet the AG’s Opinion goes on to suggest that the confidentiality protections established by the FCC’s mandatory minimum relay standards are insufficient to guarantee the privacy needs of California residents. For example, the AG states that without a disclosure requirement, the confidentiality of private communications dealing with “discussions about medical, psychological, employment, legal, sexual, marital and other personal matters” might be compromised when relay services are used simply “because one party is disabled.”⁵⁵ In another part of the Opinion, the AG goes so far as to compare the communications during a relay call to the “secret monitoring of a telephone call using an extension telephone.”⁵⁶ In defense of these assertions, the AG insists that the FCC’s non-disclosure provisions do not fully protect the confidentiality of relay

⁵¹ See e.g., RFP sections 6.6.2 (Confidentiality); 6.6.2.1 (Total Confidentiality); 6.6.2.2 (Pledge of Confidentiality required by all relay provider staff); 6.6.2.3 (Discussion of Calls); 6.6.2.4 (Emergencies); 6.6.2.5 (Monitoring of Calls); 6.6.2.6 (Confidentiality Policy); 6.6.2.7 (Termination for Violation of Confidentiality); 6.6.2.8 (Restriction of Information); 6.6.4.10 (Customer Profile Data Confidentiality); and 32 (Confidentiality of Data).

⁵² AG Opinion at 2. The AG Opinion also acknowledges that CTS more closely approximates the flow and speed of conversation than does traditional relay. *Id.*

⁵³ *Id.* at 2.

⁵⁴ *Id.* at 8.

⁵⁵ *Id.*

⁵⁶ *Id.* at 7, 12 citing *Ribas v. Clark*, 38 Cal. 3d 355 (1985), at 362-3.

calls,⁵⁷ and that the situations in which a CA may be permitted to disclose relay content are broader than the exceptions to non-disclosure under the California Invasion of Privacy Act.

In fact, however, the FCC's exception to the confidentiality mandate is extremely narrow and certainly no broader than those contained under California law.⁵⁸ The FCC has stated that under Section 705(a) of the Communications Act, relayed information may *only* be disclosed in "limited circumstances related to law enforcement."⁵⁹ In its very first Report and Order adopting TRS mandatory minimum standards (issued in 1991), the FCC made clear that someone could not simply request call content or even information about relayed conversations without a court-issued subpoena or upon demand of a lawful authority. That Order went on to explain that the exception in Section 705 that permits disclosure of relayed conversations applies in very limited circumstances, i.e., only when there are "authorized requests by government officials in connection with specific incidents of possible law violations."⁶⁰ In other words, law enforcement authorities may not make blanket requests for generalized information about relayed communications. Rather, the requests must be very precise, and pertain to a specific law violation that may have taken place. The FCC stated that it expected these occurrences to be "extremely rare," and confirmed that where these authorized requests are not made, CAs are prohibited from "divulging the content or existence of any relay conversations."⁶¹ Further protections are afforded by the fact that FCC rules

⁵⁷ AG Opinion at 8.

⁵⁸ California allows disclosure "(1) for the purpose of construction, maintenance, conduct or operation of the services and facilities of a public utility . . .; (2) pursuant to a tariff of a public utility . . .; or (3) on an 'order of the court'" *Id.* at 10 (citations omitted).

⁵⁹ First Report and Order at ¶14, citing 47 U.S.C. § 605(a).

⁶⁰ First Report and Order at ¶15 n. 14. The FCC analysis makes clear that disclosure of relay content under Section 705 would not be permitted through "ordinary litigation discovery demands," as suggested by the AG. See AG Opinion at 9.

⁶¹ First Report and Order at ¶14.

allow for complaints to be filed against relay providers not in compliance with these strict confidentiality requirements,⁶² and that relay providers who violate these confidentiality requirements could be subject to criminal penalties and civil damages.⁶³ In this manner, the privacy interests of *all* parties to a relay call are rigorously protected by the FCC's relay rules.

The AG further suggests that a CA may have to disclose a telephone communication when necessary to prohibit use of telephone company facilities for illegal purposes – including communications that contain obscene, pornographic or harassing content. This statement, too, has no basis in law.⁶⁴ The FCC's stringent privacy guarantees originated with the FCC's very first Report and Order on relay services, and were the result of intense debate at the FCC shortly after passage of the ADA in 1990. Among other things, this debate centered on the extent to which the congressional directive for functional equivalency would nevertheless allow state relay programs to force CAs to disclose conversations involving obscene or illegal calls, calls involving child or spousal abuse, and calls containing verbal sexual assaults. The subject came up because, at the time that the FCC began crafting its relay standards, many states still imposed outright prohibitions on such calls and wanted CAs to disclose information pertaining to such conversations that were “overheard” in the process of relaying calls.⁶⁵

⁶² 47 U.S.C. §§ 225(e) and (g); 47 C.F.R. § 64.604(c)(6).

⁶³ 47 U.S.C. § 605(e).

⁶⁴ For support, the AG Opinion cites to 47 U.S.C. § 605(f), incorporated by reference into 47 C.F.R. § 64.604(a)(2)(i).

⁶⁵ For example, the Oregon Independent Telephone Association did not want CAs to have to participate in obscene or harassing calls and the Connecticut Department of Human Resources wanted CAs to be able to use their own judgment in completing these or illegal calls. Similarly, the Deafness Education Advocacy Foundation wanted an exception to the confidentiality requirement for calls where the called party was a non-consenting recipient of verbal sexual assault. First Report and Order at ¶6.

After careful consideration, the FCC unequivocally concluded that such state disclosure laws could not hold up against the requirement for functional equivalency and would “be preempted by the ADA to the extent they affect relay communications.”⁶⁶ Rather, as noted above, the Commission ruled that CAs were intended to act as “transparent conduits relaying conversations without censorship or monitoring functions,”⁶⁷ and said that such general affirmative disclosure statutes that required CAs to automatically disclose information about abusive acts to law enforcement authorities conflicted with ADA mandates requiring relay providers to maintain the strict confidentiality of all relay calls. In other words, relay providers were specifically directed to handle all calls without revealing their content, regardless of state statutes to the contrary.

VII. The FCC has the Authority to Preempt California Law

Title IV of the ADA unequivocally provides the FCC with absolute authority over the nation’s intrastate and interstate telecommunications relay systems. This provision makes clear that it is the FCC’s responsibility to develop functional requirements, guidelines, operations procedures, and minimum standards to ensure that relay services are functionally equivalent to conventional voice telephone services.⁶⁸ While Title IV also gives states the opportunity to operate their own relay programs, any state wishing to do so must first submit documentation describing its program to the Commission and have that information reviewed to ensure that it makes available TRS “in a manner that meets or exceeds the requirements of regulations by the Commission.”⁶⁹ The FCC may then grant state certification to such state

⁶⁶ *Id.* at ¶14, n. 14.

⁶⁷ *Id.* at ¶13.

⁶⁸ 47 U.S.C. §§ 225(d)(1) and (2).

⁶⁹ 47 U.S.C. § 225(f)(2)(A).

but, even then, it retains the authority to suspend or revoke such certification if, after notice and opportunity for a hearing, the Commission determines that it is no longer warranted.⁷⁰

In addition to prescribing mandatory minimum standards for TRS nationwide and fulfilling its responsibility to review and approve state certifications every five years, the Commission has exercised its authority as the final arbiter of specific state TRS practices on at least two specific occasions. The first, discussed above, occurred in the Commission's very first Report and Order, when the Commission explicitly preempted all state disclosure statutes that could potentially conflict with the Commission's strict confidentiality mandates. The second occasion occurred in 1994, when the Commission directed the Arkansas PSC to prohibit its common carriers from double billing TRS users for relay calls made under "optional calling plans."⁷¹ The problem in Arkansas began when that state's PSC approved a calling plan that allowed Arkansas residents to pay a set monthly fee for unlimited calling to specified regions of the state, but only if the calls were dialed directly. Each time individuals on one of these plans placed calls through the state's relay service, they were charged a second time, under the theory that they were using billable operator services. Additionally, the plan charged relay users for all local directory assistance, even though subscribers who did not use relay services received at least two free directory assistance calls each month.

In response to the above, the National Center for Law and Deafness petitioned the FCC to either force the Arkansas PSC to cease and desist from engaging in these unlawful practices or to decertify the Arkansas relay program. The FCC granted the petition, ruling that the Arkansas plan clearly violated the ADA's prohibition against charging relay

⁷⁰ 47 U.S.C. § 225(f)(4).

⁷¹ *Request to Decertify the State of Arkansas Telecommunications Relay Services Program*, Memorandum Opinion and Order, File TRS-26-94, DA 95-1251 (June 9, 1995).

customers more than they would have to pay for equivalent voice services. The Commission then gave the state 90 days to come into full compliance with its TRS rules or risk revocation of its relay certification.⁷² The state complied soon thereafter, firmly establishing the FCC's authority to regulate intrastate relay programs.⁷³ The FCC should once again exercise its authority in the instant situation, to force California to strike the offending disclosure provision from its relay requirements.

VIII. The Restrictive Provision Evidences the Need for a CTS Mandate

Lack of a federal mandate for CTS has left consumers vulnerable to the type of restriction now being imposed by California. Indeed, the inconsistencies in state CTS programs have been many, leaving consumers exposed to the whim of state regulatory bodies who, up until now, have been free to craft their own limitations on this service. To rectify this situation, over the past five years, national consumer organizations have been urging the FCC to adopt a mandate that will bring about consistency and uniformity of CTS across the United States.⁷⁴ In fact, most recently, in a Supplement to their 2005 Petition to Mandate Captioned Telephone Relay Service, nine national consumer organizations, together with two national coalitions of several disability groups, had this to say about the forthcoming California CA announcement:

Not only is the California restriction unnecessarily invasive, it is antithetical to one of the basic premises of the ADA – “to address the major areas of discrimination [including communication] faced day-to-day by people with disabilities.” [42 U.S.C.

⁷² *Id.*

⁷³ More about this Arkansas Decertification Petition can be found in Peltz Strauss, K, *A New Civil Right – Telecommunications Equality for Deaf and Hard of Hearing Americans* (Washington, D.C.: Gallaudet Press), 2006 at 129-31.

⁷⁴ See Petition for Rulemaking to Mandate Captioned Telephone Relay Service and Approve IP Captioned Telephone Relay Service, CG Dkt. 03-123, filed October 31, 2005, available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=6518175869> (“2005 Petition to Mandate Captioned Telephone Relay Service”).

§ 12101(b)(4).] If left unchecked, other state programs could similarly chip away at the integrity of this service to the point where its most useful attributes will be stripped away. This illustrates the importance of having the FCC regulate this service for all of the United States and its territories. Provisions like this should not be permitted, and would not be permitted, were the FCC to mandate CTS and clearly set out mandatory minimum standards for its operations.⁷⁵

IX. Conclusion

CTS CAs do not overhear, listen to, secretly monitor, record or disclose telephone conversations that they relay. Nor do these employees participate in any way in the calls that they relay. Rather, the sole function of a CA is to convert an inaccessible mode of communication into an accessible mode of communication to facilitate communication between a CTS user who has hearing loss and another party to the call. In this manner, CTS provides telephone services in real-time to people who have hearing loss in a manner that is functionally equivalent to the telephone services enjoyed by conventional voice telephone users. Forcing a CTS CA to announce his or her presence on a relay call significantly diminishes the functional equivalency of this service for its users in violation of the ADA's Title IV, as codified by Section 225 of the Communications Act.

For the reasons described above, we urge the FCC to declare impermissible the practice of forcing CAs to announce their presence while handling CTS calls, to strike down the California offending provision, and, if it deems it necessary, to adopt a rule codifying the impermissibility of such practices. Given that California intends to begin imposing its discriminatory restriction within a few short months, we further urge expedited action by the Commission on this petition.

⁷⁵ Supplement to Petition to Mandate Captioned Telephone Relay Service, CG Dkt. 03-123, filed June 10, 2009, at 26, available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=6520220478>.

Respectfully submitted,

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Appendix A

California Public Utilities Commission Request for Proposal 08PS5800 for California Relay Services 3, CPUC Document 368851 January 21, 2009

6.12.4.1 Disclosure of CA Participation in CTS Conversations

California State law prohibits monitoring, recording or transcribing of telephone conversations unless *all* parties to the conversation give their *express prior consent* or have *received notice* that such monitoring, recording or transcribing is occurring. In the CTS calling process there is a CA participating in the call, potentially without the Voice user's knowledge and possibly without the CTS device user's awareness. While many CTS consumers consider this transparency a significant benefit because of the natural flow of the conversation and some may not have informed their callers that they have a hearing disability, there are nevertheless California laws and regulations that require all parties to be fully informed that the CA is on the call.¹²

In order to assure that the privacy and disclosure requirements of the State of California are consistently applied, the CTS contractor must put in place procedures for a formal disclosure that will be shared with all parties to the conversation, on every call that includes a California-based participant. The disclosure communications for the CTS device user must include a text message transmitted at a speed that may be easily read and understood. The exact final text for these disclosures must be approved by the CPUC prior to commencement of the contract.

Bidders are required to confirm that they understand the above privacy requirements and describe how they propose to satisfy the CA participation disclosure requirement to each of the parties engaged in a CTS conversation. The description shall include:

1. The methodology of delivering the disclosures,
2. A flow chart depicting the insertion and delivery of appropriate text and voice messages to be provided by the CTS Relay Provider, as well as
3. A proposed example of the disclosure messages.

¹² Relevant laws include but are not limited to California State Penal Code Sections 630-632 and California Public Utilities General Order ("GO") 107-B.

Appendix B

Request for Intervention and Modification, filed by the California Coalition of Agencies Serving the Deaf and Hard of Hearing, Inc., Hearing Loss Association of California, National Association of the Deaf, Telecommunications for the Deaf and Hard of Hearing, Inc., Association of Late-Deafened Adults, and Hearing Loss Association of America (“Consumer Groups”).

To: California Public Utilities Commission

Via Electronic Mail:

President Michael R. Peevey
Commissioner Dian M. Grueneich
Commissioner John A. Bohn
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Date: March 23, 2009

Re: **Request for Intervention and Modification** – California Public Utilities Commission
Request for Proposal 08PS5800 for California Relay Services 3, CPUC Document 368851,
January 21, 2009 – Section 6.12.4.1 “Disclosure of CA Participation in CTS Conversations”

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I. Introduction

The California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH) consists of community-based nonprofit agencies providing various social services to Californians who are deaf or hard of hearing: Deaf Community Services of San Diego, Inc.; Center on Deafness Inland Empire; Orange County Deaf Equal Access Foundation; Greater Los Angeles Agency on Deafness, Inc.; Tri County-GLAD; Deaf and Hard of Hearing Service Center, Inc.; NorCal Services for Deaf and Hard of Hearing; and Deaf Counseling, Advocacy & Referral Agency. The Hearing Loss Association of California (HLA-CA) and its 29 chapters, is affiliated with the national organization, Hearing Loss Association of America, and represents and supports the interests of people who have a hearing loss and live in California. The National Association of the Deaf (NAD), Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), Association of Late-Deafened Adults (ALDA), and the Hearing Loss Association of America (HLAA) are national organizations that advocate on behalf of people who are deaf, hard of hearing, late-deafened, and deaf-blind, including residents, members, chapters, and affiliates in the great state of California, to ensure equal opportunity and equal access.

This is to notify you that our State of California constituencies informed us about and sought our support to oppose a provision in the California Public Utilities Commission (CPUC) Request for Proposal (RFP) 08PS5800 for California Relay Services 3 (CRS-3), CPUC Document 368851, January 21, 2009 (the RFP). That provision, Section 6.12.4.1 (a copy of which is attached), would require a Captioned Telephone Service (CTS) contractor (Relay Provider) to inform all parties to a CTS call, by text and voice messages, about the “participation” of a CTS Communications Assistant (CA) on that call. For the reasons expressed below, the CCASDHH, HLA-CA, NAD, TDI, ALDA, and HLAA vigorously oppose the requirements of CRS-3 RFP Section 6.12.4.1, and request that Section 6.12.4.1 be deleted in its entirety.

II. Executive Summary

We strongly disagree with the apparent conclusion drawn by CPUC that any California Relay Service constitutes illegal wiretapping, eavesdropping, monitoring, recording, or transcribing unless the Relay Provider informs the telephone user that Relay Services are being provided. Title IV of the Americans with Disabilities Act of 1990 (ADA), codified at 47 U.S.C. § 225, mandated the establishment of nationwide Relay Services to provide access to the nation’s telephone system and to enable two-way communication between hearing and deaf or hard of hearing people, in a manner that is functionally equivalent to telephone users. Under this system of Relay Services, either party may request and engage a Relay Service for that purpose. The ADA mandates strict confidentiality and non-disclosure of the content of all Relay Services provided and prohibits Relay Services from recording any relayed calls. As such, the privacy interests of *all* parties to a relay call are promoted, protected, and ensured by the mandates of Title IV of the ADA. Further, a Relay Service CA is not considered a “third party” to a telephone call by users of these services, the Federal Communications Commission (FCC), or by the federal judiciary. Instead, a CA is intended to be, is considered, and should be treated as a “transparent conduit” to the greatest extent possible to achieve functional equivalency. The purpose and function of a CA is to convert an inaccessible mode of communication to an

accessible mode of communication to enable two-way communication by the parties to a telephone call.

As such, the provision of functionally equivalent telephone service, as mandated by the ADA, should not be construed as illegal wiretapping, eavesdropping, monitoring, recording, or transcribing, given the stringent confidentiality requirements already prescribed by Congress and the FCC. These very federal standards and confidentiality requirements are prescribed by the RFP itself in sections 4.3.1, 6.1.4, and 6.6.2, as well as the ADA compliance certification in section 11. *Requiring a Relay Provider to announce or disclose to a telephone user that Relay Services are being provided also identifies that the other person on the call is deaf or hard of hearing*, even when such is not necessary for the provision of the Relay Service, and fails to protect the privacy interests of all of the parties to the call. Instead, the requirements of CRS-3 RFP Section 6.12.4.1 *will result in a significant invasion of the privacy of the deaf or hard of hearing person, unnecessary disclosure of the existence of an individual's disability, and the opportunity and potential for discrimination on the basis of disability that the ADA's mandate for Relay Services was intended to eliminate.*

CRS-3 RFP Section 6.12.4.1, which would require a CTS Relay Provider to announce the delivery of services on a call, conflicts with the fundamental objective of Title IV of the ADA – functional equivalency – and negates one of the most important contributions that CTS has made to functional equivalency – enabling the CTS CA to be, in fact, a *transparent conduit of the call*. For these reasons, and as further described below, we request that the requirements specified in CRS-3 RFP Section 6.12.4.1 be eliminated.⁷⁶

III. Consumer Input

At the outset, we note that Section 1.6 of the CRS-3 RFP indicates that the CPUC solicited CRS consumer recommendations: “In 2007 the CPUC asked the [Deaf and Disabled Telecommunications Program] DDTP advisory committees, the Telecommunications Access for the Deaf and Disabled Administrative Committee (TADDAC) and the California Relay Service Advisory Committee (CRSAC), for careful and considered input regarding consumer needs and recommendations for CRS-3. The committees established a CRS-3 Work Group representing all CRS consumer groups. . . . After seven months of collaboration and research, TADDAC released the ‘*Comments on the RFP Process Involving the California Relay System RFP 2008*’ report in April 2008.” At no time during this extensive, comprehensive, and collaborative effort was there any mention or suggestion that CPUC was considering or intended to include the requirements found in Section 6.12.4.1.

Although CPUC apparently values and sought input about consumer needs, CPUC added Section 6.12.4.1 to the RFP after the initial consumer consultations were completed. CPUC failed to return to and consult with consumers or afford consumers an opportunity to consider the need for

⁷⁶ The text of Title IV of the ADA, 47 U.S.C. § 225, is available at <http://www.fcc.gov/cgb/dro/title4.html>. The FCC regulations implementing Title IV of the ADA, 47 C.F.R. § 64.601 - 64.606, is available at <http://www.fcc.gov/cgb/dro/4regs.html>. For purposes of brevity and readability, citations to and excerpts from FCC reports, orders, and other documents referred to in this Request to Delete Section 6.12.4.1 from the CRS-3 RFP, and which are relevant to the provision of Relay Services, are attached.

and impact of the Section 6.12.4.1 requirements before CPUC released the RFP. As a result, the consumer community was unaware of this issue until well after publication of the RFP and could not express its opposition until this time. Further, CRS-3 RFP provides no formal opportunity for consumer input. For these reasons, we submit this request broadly, within and beyond the CPUC.

IV. Relay Services Do Not Violate California State Privacy Law

Section 6.12.4.1 of the RFP asserts that “California State law prohibits monitoring, recording or transcribing of telephone conversations unless *all* parties to the conversation give their *express prior consent* or have *received notice* that such monitoring, recording or transcribing is occurring.” (Emphasis in the original.) For this proposition, the RFP cites, for example, California State Penal Code Sections 630-632 and California Public Utilities General Order 107-B. Section 6.12.4.1 further states that, “to assure that the privacy and disclosure requirements of the State of California are consistently applied, the CTS contractor must put in place procedures for a formal disclosure [of CA participation in CTS conversations] that will be shared with all parties to the conversation [by text and voice messages], on every call that includes a California-based participant.”

We note that it is likely that California legislators and regulators enacted the cited privacy provisions prior to the establishment of Relay Services, and certainly prior to the relatively recent advancements made in Relay Service technologies, including captioned telephones. As such, it is not likely that Relay Services, developed as a result of Title IV of the ADA, were envisioned when these privacy provisions were enacted. Notably, these privacy provisions make no mention of Relay Services. We also note that the CRS-3 RFP, in Section 6.1.4 (Federal Standards), requires that Relay Providers comply with all applicable federal law. Section 6.1.4.1 further recognizes that, “Where there is a difference between the standard of a FCC regulation and the standard of a requirement in this RFP, the stricter standard of the two shall prevail relative only to that portion of the standard that differs except that notwithstanding any stricter standard in this RFP the standard shall not, in the opinion of the CPUC, conflict with federal law.” Such a conflict exists here.

Nevertheless, conflicts that arise with new technologies, between state law and the mandates and objectives of Congress, or divergent privacy interests may be reconciled through interpretations of the law in light of a variety of factors. Such factors exist in this case, as further described herein, and should be given due weight and consideration to ensure that the rights and protections of state and federal laws are accorded to all Californians.

California State Penal Code Sections 630-632

The intent of the California Legislature, in enacting Chapter 1.5 (Invasion of Privacy) of the California Penal Code, was to “protect the right of privacy” threatened by the “development of new devices and techniques for the purpose of eavesdropping upon private communications” that “created a serious threat to the free exercise of personal liberties.” California Penal Code § 630. Relay Services were, unequivocally, *not developed for the purpose of eavesdropping* on private communications. Instead of being a “threat” to the free exercise of personal liberties, *Relay*

Services promote the free exercise of personal liberties by making the telephone system and services accessible to everyone.

Section 631(a) of the California Penal Code establishes as a crime: any person who “intentionally taps, or makes any unauthorized [telephone] connection,” who “willfully and without the consent of all parties to the communication, or in any unauthorized manner” attempts to learn the contents of any communication in transit, or who “uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained.” CTS Relay Providers and CAs do not, intentionally or otherwise, *tap* (as in wiretap) or make any *unauthorized* telephone connections. They do not try to learn or ascertain the contents of a CTS call, *willfully* and without the consent of all parties or in any other *unauthorized* way. They do not use or try to use any information conveyed in a CTS call for any purpose, including for the purpose of communicating that information to anyone beyond the individuals making the CTS call itself. CAs are prohibited from disclosing the content of any Relay Service call; they are required to maintain strict confidentiality.

Section 632(a) of the California Penal Code establishes as a crime: any person who “intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication,” including communication by means of a telephone or other device. CTS Relay Providers and CAs do not use *electronic amplifying or recording devices*, and they do not *eavesdrop on or record* the confidential communication conveyed by telephones or other devices, intentionally or otherwise, with or without the consent of all the parties to that confidential communication. CAs are prohibited from keeping records of any conversation; they never record any communication.

Section 632.5(a) and Section 632.6(a) of the California Penal Code establish as a crime: any person who “maliciously and without the consent of all parties to the communication, intercepts, receives, or assists in intercepting or receiving a communication” transmitted between cell phones and/or cordless telephones or between any cell phone or cordless telephone and a landline telephone. CTS Relay Providers and CAs do not *maliciously* intercept or receive communication transmitted between phones of any kind, with or without the consent of all parties to the call.

In the ordinary course of business, CTS Relay Providers and CAs do not have the requisite intent, nor do they engage in acts which would constitute an invasion of privacy as proscribed by the California Penal Code. CTS is a form of “telecommunications relay services” (TRS) which is defined in Title IV of the ADA, to mean “telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio.” 47 U.S.C. § 225(a)(3). In other words, the role of the CTS CA is to enable people – with and without a hearing or speech impairment – to communicate with each other in a manner that is *functionally equivalent* to telephone users. Such services include enabling two-way communication when one party uses a telephone and the other party uses a TTY, text messaging system, videophone,

or captioned telephone (a CTS device). In all of these forms of Relay Services, the CA converts one mode of communication that is not accessible into another mode of communication that is accessible, so *all* parties have access to the communication. Under this system of Relay Services, either party may request and engage a Relay Service for that purpose. The ADA mandates strict confidentiality and non-disclosure of the content of all Relay Services provided and prohibits Relay Services from recording any relayed calls. 47 U.S.C. § 225(d)(1)(F). As such, the privacy interests of *all* parties to a relay call are promoted, protected, and ensured by the mandates of Title IV of the ADA.

The CPUC recognizes the authority and mandates of Title IV of the ADA and the FCC. See, e.g., CPUC CRS-3 RFP Sections 3.1 (Telecommunications Relay Service); 4.3.6 (New and Innovative Relay Services); 6.1.4 (Federal Standards); and 6.1.4.1 (FCC Standards). Specifically, Section 4.3.1 of the RFP states, “Relay Providers must continuously comply with all applicable FCC and CPUC performance and operational orders, rules and standards relative to TRS including those that would otherwise apply to common carriers providing TRS.”

In Section 3.3.6 of the CRS-3 RFP, CPUC acknowledges that CTS is an “FCC approved voice-carry-over relay service.” CPUC reimburses Relay Providers only for intrastate (California-to-California) CRS calls. CPUC does not pay for Relay Services provided on interstate or international CRS calls (calls originating in or terminating outside of California). Instead, Relay Providers are responsible for obtaining reimbursement for interstate and international CRS calls from the FCC’s Interstate TRS Fund which is administered by the National Exchange Carrier Association (NECA) under the authority of the FCC. CPUC CRS-3 RFP Section 4.3.2.

The CPUC also recognizes the importance of and requires absolute confidentiality. See, e.g., CPUC CRS-3 RFP Sections 6.6.2 (Confidentiality); 6.6.2.1 (Total Confidentiality); 6.6.2.2 (Pledge of Confidentiality) (required for all Relay Provider staff); 6.6.2.3 (Discussion of Calls); 6.6.2.4 (Emergencies); 6.6.2.5 (Monitoring of Calls); 6.6.2.6 (Confidentiality Policy); 6.6.2.7 (Termination for Violation of Confidentiality); 6.6.2.8 (Restriction of Information); 6.6.4.10 (Customer Profile Data Confidentiality); and 32 (Confidentiality of Data).

Given the requirements of Title IV of the ADA, the FCC’s implementing regulations, the CPUC CRS-3 RFP contractual requirements, and the provisions of the California Penal Code addressing confidentiality, *a CTS Relay Provider or CA would, by necessity, have to be acting outside the scope of employment in order to violate the California Penal Code’s privacy provisions.*

This conclusion is supported by the *exceptions* provided in the California Penal Code itself. Section 631(b)(1) provides that Section 631 does not apply “to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited herein are for the purpose of construction, maintenance, conduct or operation of the services and facilities of the public utility.” Section 631(b)(2) also provides that Section 631 does not apply “to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of a public utility.” Sections 632, 632.5, and Section 632.6 each contain exceptions that are virtually identical to Sections 631(b)(1) and (2), described above. See California Penal Code Sections 632(e), 632.5(b), and 632.6(b).

The *conduct and operation* of Relay Services, including CTS, is part of the *business of providing communications services* and fall within the exceptions provided in the California Penal Code in Sections 631(b), 632(e), 632.5(b), and 632.6(b). CRS contractors are operating as agents of public utilities engaged in that business. Relay Services, including CTS, are authorized and mandated by law to make telephone services accessible. CAs, as employees of the contractors, do not intercept or receive communication unless requested and authorized by at least one party, and they are provided access to the communication for the sole purpose of converting inaccessible modes of communication to accessible modes of communication, which benefit *all* parties to a telephone conversation. Furthermore, they are required to maintain strict confidentiality and are prohibited from recording or disclosing the content of any call. Thus, the provision of Relay Services, including CTS, by employees of contractors serving as agents of public utilities acting within the scope of their employment to provide communications services, falls within the exceptions of and does not violate the proscriptions of the California Penal Code against eavesdropping.

This conclusion is further supported by Section 632(f) of the California Penal Code which provides that Section 632 “does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear.” The provision of Relay Services, including CTS, is akin to the use of hearing aids and similar devices that enable access to communication conveyed by the hearing of sounds ordinarily audible to the human ear. The purpose of Section 632(f) is well served by including Relay Services under its umbrella.

California Public Utilities General Order 107-B

California Public Utilities General Order 107-B establishes requirements of telephone companies operating in California to ensure the privacy of telephone communications. For example, General Order 107-B, Section I, requires telephone companies to “maintain complete records of all instances in which employees discover any devices installed for the purpose of overhearing communications over the lines of such corporation”; maintain a file “of all instructions to employees, regulations, rules and forms designed to ensure the privacy and/or maintain the secrecy of communications over the lines of the corporation together with a record of the steps taken to ensure the privacy of and /or secrecy of communications”; and to report to the CPUC on these provisions annually.

General Order 107-B, Section II, sets out the “Regulations Governing Monitoring and Recording.” Generally, the California telephone network cannot be used “for the purpose of transmitting any telephone conversation which is being monitored or recorded” *except* when “[a]ll the parties to the conversation give their express prior consent to the monitoring or recording” or when “notice that such monitoring or recording is taking place is given to the parties to the conversation” in accordance with General Order 107-B. “Monitoring” is defined as “the use of monitoring equipment to allow a third person to overhear the telephone conversation of two or more persons.” “Monitoring equipment” is “any method or apparatus by which a public utility telephone corporation or a telephone subscriber . . . may listen to or record telephone conversations” without “any audible indication to the parties conversing that their

conversation is being overheard” or without “connection of a device to provide two-way conversation between the listener and the parties conversing so that the listener’s voice may be heard throughout any period of monitoring” or without “any indication to the parties conversing that their conversation is being recorded.” Notice of monitoring must be given by providing an automatic and repeated “beep” tone warning that is audible to all parties, or by “verbal announcement by the operator of monitoring equipment to the parties to a communication that their communication is being monitored.” “Recording” is defined as “the recording or transcribing of any telephone conversation by means of any electronic device” and notice is generally given by providing an automatic and repeated “beep tone” warning audible to all parties. We note, here, that the terms “recording” and “transcribing” in the context of telephone privacy provisions mean to preserve in a manner that can be copied, such as a tape recording or a writing; not the conversion of one mode of communication to another mode of communication, each of which is conveyed in real time and not preserved by a CTS Relay Provider.

Like the goal of the California Penal Code, the goal of these public utilities regulations is to reduce or eliminate activities that are designed to invade the privacy of telephone communications. General Order 107-B prohibits the monitoring or recording of telephone communications, except where all parties to a conversation give their express prior consent or when notice of such monitoring or recording is given to the parties to the conversation. Monitoring does not include the “[a]ccidental or unintentional interception of telephone conversations by telephone utility personnel engaged in normal operation, maintenance, or construction.” Like the telephone utility personnel, a Relay Service CA is engaged in the normal operation of the telephone utility. As the FCC has explained, repeatedly, *CAs are transparent conduits* – conduits that relay conversations *without* censorship or *monitoring functions*.

More importantly, Relay Providers and CAs, including CTS, do not *overhear, listen to, or record* any telephone conversations. Rather, the CTS CA function is to *hear* the telephone user and convert the telephone user’s mode of communication from speech to text – by re-voicing and using speech recognition technology – to enable two-way communication between that telephone user and CTS device user who is deaf or hard of hearing. Without the CTS CA, a person who cannot hear or who does not hear well cannot be a party to the telephone conversation. In other words, like the telephone device and the lines that convey the signals, a CTS CA makes a telephone conversation possible. The function of the CTS CA is to deliver telephone service in a manner that is functionally equivalent to telephone users, in compliance with Title IV of the ADA. Furthermore, the CTS CA is prohibited from intentionally altering a relayed conversation and must transmit conversations verbatim and in real time. 47 C.F.R. §§ 64.604(a)(1) and (2)(ii). The intent, design, and goal of providing Relay Services is *not* to invade the privacy of telephone communications. On the contrary, the intent, design and goal of providing Relay Services is to make telephone communications possible for and to promote, protect, and ensure the privacy of all parties.

Because Relay Providers and CAs, including CTS, are not monitoring, listening in on, overhearing, or recording telephone conversations, there is no need to provide audible “beep” tones, verbal announcements, or other forms of notification. Express prior consent of *all* parties to the call for the provision and delivery of Relay Services to make that call accessible to all

parties cannot be required under General Order 107-B because a CA is not monitoring or recording the call.

Privacy and Title IV of the ADA

The laudable intent of California State law is to protect the privacy of telephone conversations. In the case of Relay Services, the ADA mandates strict confidentiality and non-disclosure of the content of any and all Relay Services provided and prohibits Relay Services from keeping records of or recording the content of any relayed calls. 47 C.F.R. § 64.604(a)(2). Only Section 705 of the Communications Act authorizes CAs to divulge the existence and content of conversations “in response to a subpoena issued by a court of competent jurisdiction” or “on demand of other lawful authority.” 47 U.S.C. §§ 605(a)(5) and (6). The FCC has interpreted these exceptions to apply only to authorized requests by government officials in connection with specific incidents of possible law violations and to be extremely rare. CAs who violate these confidentiality requirements are subject to criminal penalties and civil damages. 47 U.S.C. § 605(e). Further, Title IV of the ADA requires and the FCC regulations provide a mechanism for filing complaints against Relay Providers who do not comply with the statute and regulations, including their confidentiality requirements. 47 U.S.C. §§ 225(e) and (g); 47 C.F.R. § 64.604(c)(6). As such, the privacy interests of *all* parties to a relay call are promoted, protected, and ensured by the mandates of Title IV of the ADA.

In its very first rulemaking implementing the ADA’s mandate for Relay Services, the FCC addressed these privacy interests specifically with respect to state laws requiring disclosure of telephone conversations involving obscene or illegal calls, calls involving child or spousal abuse, and calls containing verbal sexual assaults. The FCC concluded that Relay Providers could not disclose such telephone conversations because such disclosure conflicted with the ADA Title IV mandate for functional equivalency. As a result, the FCC issued rules preempting all state statutes that affirmatively required Relay Providers with knowledge of child, spousal or elderly abuse to disclose that information to law enforcement authorities. Such affirmative disclosure requirements, like the one sought to be imposed in section 6.12.4.1 of this RFP, conflict with the ADA Title IV mandate for functional equivalency. In fact, the disclosure requirement conflicts with section 6.1.4.1 of the RFP which mandates compliance with the FCC ADA requirements.

V. Communications Assistants as Transparent Conduits

Section 6.12.4.1 of the RFP asserts, “In the CTS calling process there is a CA participating in the call” and that “the CA is on the call.” Such assertions give a misleading impression of the actions and role of the CTS CA. The role of the CTS CA is to enable people – with and without a hearing or speech impairment – to communicate with each other in a manner that is *functionally equivalent* to telephone users. In all of these forms of Relay Services, the CA converts one mode of communication that is not accessible into another mode of communication that is accessible, so *all* parties have access to the communication.

In the case of CTS, the action of the CA is to re-voice what the CA hears so the CA’s speech recognition system can convert the CA’s speech into text for display on the CTS device. Although speech recognition systems that can automatically convert a telephone user’s speech to text are in development, they still have not achieved a sufficient level of accuracy for use with

Relay Services. As such, for the foreseeable future, a CA must first acquaint the speech recognition system with his or her voice and speech patterns. Once the system is “trained” in this manner, the CA is needed to re-voice a telephone user’s communication so the speech recognition system can convert what the CA says into text with the requisite rate of accuracy.

A Relay Service CA is prohibited from intentionally altering a relayed conversation and must transmit conversations verbatim and in real time. 47 C.F.R. §§ 64.604(a)(1) and (2)(ii). The FCC has consistently held that a Relay Service CA is a *transparent conduit* of telephone services – a conduit that relays conversations *without* censorship or *monitoring functions* – and not a “third party” to a telephone call. The FCC equates reaching a Relay Service CA ready to place the call as equivalent to a telephone user getting a “dial tone” when picking up the phone.

For example, the FCC has explained that a CA is to be treated solely as a *transparent conduit* with respect to the Health Insurance Portability Access Act of 1996 (HIPAA). Pub. L. No. 104-191, 110 Stat. 1936. Generally, HIPAA prohibits the disclosure of protected health information without the patient’s consent. 45 C.F.R. § 164.508. The FCC noted the concern of some health professionals that communicating with a patient through a Relay Service might violate the HIPAA privacy rule if the CA is considered a “third party” who hears the information being discussed as the call is relayed. The FCC emphasized that all forms of Relay Service can be used to facilitate calls between health care professionals and patients without violating the HIPAA privacy rule.

In addition to the FCC, the federal judiciary recently held that a CA is not a “third party” for hearsay purposes. *Germano v. International Profit Association*, 544 F.3d 798 (7th Cir. 2008). The U.S. Court of Appeals for the Seventh Circuit explained that a CA is “no more than a language conduit.” *Id.* at 803. The court also explained that various characteristics of Relay Services contribute to the transparency of the CA: (1) instead of selecting the CA, the deaf job applicant had been randomly connected to the CA; (2) the CA had no motive to mislead, to distort or to transmit statements inaccurately because she had no prior relationship with either of the parties to the call; and (3) CAs in general were assured to be reliable because their qualifications and language skills were prescribed by federal regulations. *Id.*

Like the FCC, the *Germano* court recognized that, by their very definition, CAs do not *participate* in any way *in or on* the call. CAs simply relay the conversation between the parties on those calls.

VI. Achieving Functional Equivalency

Section 6.12.4.1 notes that many CTS device users consider the transparency of the CTS CA “a significant benefit because of the natural flow of the conversation.”

Functional equivalency, the standard articulated in Title IV of the ADA, has served as the reference point in determining how Relay Services must be provided to consumers. The goal is to have the features, functions, and capabilities of Relay Services mirror telephone services as closely as possible. In its efforts to achieve functional equivalency, over the past 18 years, the FCC has established a set of intricate rules, including functional requirements, guidelines, and

operational procedures which govern the manner in which Relay Services must be provided. These rules direct Relay Services to operate 24 hours per day; prohibit CAs from refusing calls or limiting the length of any relayed calls; define the skills that a CA must have; prohibit the imposition of charges beyond those applied to functionally equivalent telephone calls; specifically require CAs to transmit conversations verbatim and in real time; and prohibit CAs from intentionally altering a relayed conversation. See 47 C.F.R. § 64.604.

When Title IV of the ADA was enacted, the only form of Relay Service technology available was that which enabled a TTY user and a telephone user to converse with one another by having the CA read the typed TTY communication to the telephone user and type the telephone user's spoken communication to the TTY user. Over the years, advancements in technology have provided other Relay Service options that offer far greater functional equivalency. One such advancement is CTS, which permits the CA to be transparent during the set up and transmission of each call.

In 2003, the FCC approved CTS and praised the new technology's ability to achieve functional equivalency through its transparency, noting its ability to connect automatically with the CTS Relay Provider and to the called party by direct dialing of the called party's number, without interaction with the CA by either party to the call. *The FCC praised the fact that CTS eliminated any need for the CA to speak or interact with either party, a feature that brought significant advantages and greater functional equivalence.* In addition, precisely because the CA is transparent, the FCC was able to waive a number of FCC regulations that apply to traditional TTY Relay Service calls. These included the requirement for the call to be voiced by a CA of the same gender. Similarly, the FCC agreed that a proposal that would have allowed CTS CAs to interrupt the conversation would interfere with the natural flow of the conversation and defeat one of the central features of CTS – *the transparency of the CTS CA*. A few years later, the FCC approved an Internet-based form of CTS and reiterated its expectation that the service would be provided in a way that is automated and invisible to both parties to the call. The FCC recognized that CTS operates more like conventional telephone service, is less intrusive, and more natural for the call participants. As such, the FCC further noted that people who lose their hearing later in life, a segment of the population that has not been well served by existing Relay Service options, may find it easier to adjust to CTS devices and CTS than to TTYs and traditional TTY Relay Services. In fact, the FCC's prediction has borne out, and CTS is filling that void, enabling thousands of older Americans to remain independent, active, and productive. CTS consumers in California want to use the telephone in virtually the same way they always have – without any announcement by a CA.

It is this attribute – that the CA is a *transparent* conduit – that Relay Service users and the FCC have recognized as being crucial to achieving functional equivalency. It is not always possible for a CA to be transparent with traditional TTY Relay Services because all of the communication must be typed, typing speeds are substantially slower than speaking or signing, and the parties must adhere to turn-taking rules. Fortunately, the ability for a CA to be transparent has significantly increased with newer Relay Service technologies that have brought about Internet-based text (in which turn-taking is less restricted), voice carry over (VCO), hearing carry over (HCO), video relay services (VRS) (for signed communication), and CTS. In fact, when offered, deaf and hard of hearing users of these Relay Services frequently choose the option that the CA

not announce to the called party that the call is a Relay Service call, because they want the call to function as similar as possible to a telephone call and because such announcement is simply unnecessary for the delivery of those Relay Services.

Even the CPUC has recognized the importance of giving Relay Service users the option of not announcing that a call is a Relay Service call. Section 6.9.7 of the RFP explicitly gives deaf, hard of hearing, and speech disabled users of TTY Relay Services a choice of having the CA announce to the called party that the call is a Relay Service call or to reject that announcement. (Presumably the announcement may also provide an opportunity for the called party to learn from the CA about the provision of and how to use the Relay Service, which some users may find expedient.) (“Upon request by the user, the CA shall not announce a call as a relay call, permitting the caller to provide explanation, if any.”). However, this very right – given to all other Relay Service users – seems to be taken away from CTS users. In Section 6.12.2 of the RFP, CPUC waives compliance with Section 6.9.7 *specifically for CTS* and, instead, appears to take a diametrically opposed position in 6.12.4.1 by requiring Relay Providers to announce CTS calls, even when such announcement is unnecessary for the delivery of those Relay Services.

CTS consumers in California feel strongly that giving relay users the choice to announce or not is completely valid and necessary, not only to achieve functional equivalency, but because, since the inception of Relay Services, businesses and other telephone users have frequently refused to accept calls that were announced by a CA as being made through a Relay Service, believing these calls to be marketing attempts or other similar calls in which they had no interest. The rate of refusal to accept calls announced by a CA has increased dramatically in recent years, due to the increased incidence of misuse of Internet-based text Relay Services by people posing as deaf or hard of hearing individuals who use these services to perpetrate fraudulent commercial transactions or for other inappropriate activities. This increased incidence of nefarious activities perpetrated through Internet-based text Relay Services has been publicized nationwide by the media and on the Internet. As a result, recipients of a call announced by a CA of *any* Relay Service – not only Internet-based text Relay Services – more frequently refuse to accept the call than ever before. When an ADA-covered entity does not accept a relay call, the individual who is deaf or hard of hearing is denied the ability to perform his or her job, or make an appointment, or engage in one of a plethora of activities needed to maintain that individual’s independence, privacy, and productivity. The FCC has issued public notices directing businesses to accept Relay Service calls in accordance with their ADA obligations so as not to discriminate against people with disabilities. But these notices have had only limited impact. The FCC, along with other federal government entities, Relay Providers, and consumer groups will continue to implement measures to curtail the incidence of Internet-based text Relay Service misuse and to restore the confidence of businesses and the general public in Relay Services, generally. In the meantime, the choice to have a CA announce a call as a Relay Service call has become even more necessary, not only to achieve functional equivalency, but to increase the chance that the call will be accepted and completed.

CTS achieves *functionally equivalent* telephone service, as mandated by Title IV of the ADA. CTS also provides an opportunity for a person who is deaf or hard of hearing to be treated just like everyone else who uses a telephone. CTS offers a means by which Relay Service users no longer have to worry about whether their calls will be accepted or not. Not only is Section

6.12.4.1 unnecessary for the purpose of processing the CTS call, it is antithetical to one of the basic premises of the ADA – “to address the major areas of discrimination [including communication] faced day-to-day by people with disabilities.” 42 U.S.C. § 12101(b)(4). Removing the choice of whether to announce or not a CTS call reduces substantially the functional equivalency of this service, in direct conflict with Title IV of the ADA. Simply put, *a CA cannot be a transparent conduit when the Relay Provider is required to disclose that the call is being facilitated by a Relay Service!*

VII. Violating the Privacy of Individuals who are Deaf or Hard of Hearing

Section 6.12.4.1 of the RFP requires the CTS Relay Provider to “put in place procedures for a formal disclosure [of CA ‘participation’] that will be shared [by text and voice messages] with all parties to the conversation, on every call that includes a California-based participant.”

Section 6.12.4.1 suggests further that a CTS device user may be unaware that a CTS CA has been engaged to convert the telephone user’s speech to text. This circumstance is virtually impossible because the CTS device user cannot receive the service of a CTS CA without requesting the service. Further, the performance of the service is evident as text displayed on the user’s CTS device.

Section 6.12.4.1 seeks, then, to ensure that the telephone user knows that a CTS “CA is on the call” by requiring the Relay Provider to “put in place procedures for a formal disclosure that will be shared with all parties to the conversation”; a “CA participation disclosure.” Such a disclosure misconstrues the actions and role of the CTS CA. CTS CAs do not *participate* in any way *in or on* the call. These CAs simply relay the conversation between the parties on those calls, converting an inaccessible mode of communication to an accessible mode of communication to enable two-way communication by the parties to a telephone call. The CA is intended to be, is considered, and should be treated as a transparent conduit to the greatest extent possible, given the Relay Service technology in use, in order to achieve the functional equivalency mandated by Title IV of the ADA.

Section 6.12.4.1 also notes that many CTS device users “may not have informed their callers that they have a hearing disability.” When the CA is a transparent conduit and functional equivalency has been achieved through the delivery of Relay Services, there is absolutely no need for CTS device users (or users of any other form of Relay Service) to inform the telephone user that they have a hearing disability. In such cases, the choice of whether to disclose or not to disclose the existence of a disability rests with the CTS device user, as it should.

Section 6.9.7 of the RFP states, “The CA shall not have the option to inform the called party that the caller is deaf or speech disabled unless the caller asks the CA to do so.” This is appropriate, but also misleading. Relay Services are used when one of the parties to a call is deaf or hard of hearing or has a speech disability. *Common sense dictates that an announcement or disclosure that a telephone call is a “Relay Service call” also and simultaneously announces and discloses the existence of a disability.* This is an unavoidable consequence of such announcements and disclosures. As such, Section 6.12.4.1 conflicts with Section 6.9.7, which appropriately recognizes that the choice to disclose the existence of a disability belongs to the individual.

The issue of identification as a person with a disability in the context of Relay Services has significant consequences because these services enable access to the entire universe of telephone users. Generally, under the ADA, when a person with a disability needs or wants a reasonable accommodation from an ADA-covered entity, that person must “self-identify” as a person with a disability. If there is no need to request a reasonable accommodation, however, self-identification as a person with a disability is not required at all. Sadly, identification as a person with a disability opens the door to discrimination on the basis of disability, a form of discrimination which, today, is still pervasive, sometimes overt, and often subtle or attitudinal. By requiring a CTS Relay Provider to announce or disclose that a call is a Relay Service call, *Section 6.12.4.1 results in the indirect disclosure of the existence of a disability and creates the opportunity to discriminate on the basis of disability in violation of the basic principles upon which the ADA is predicated.*

Section 6.12.4.1 of the RFP, which requires a CTS Relay Provider to announce or disclose the fact that the call is a Relay Service call, is equivalent to requiring the CTS CA to identify one of the parties as being deaf or hard of hearing. The choice of the CTS device user to self-identify or not self-identify (to the other party to the call) as a person who is deaf or hard of hearing is totally obliterated. That is the impact, effect, and result of Section 6.12.4.1. Mandating a CTS Relay Provider to take this action is also particularly and extremely offensive to the dignity, self-determination, independence, and privacy of the person who is deaf or hard of hearing.

In summary, Section 6.12.4.1 inappropriately and unnecessarily places the alleged privacy interests, if any, of the telephone user above the personal privacy interests of the deaf or hard of hearing CTS device user. Such a result cannot stand.

VIII. Conclusion

For the reasons described above, we vigorously oppose the requirements of Section 6.12.4.1 of the CRS-3 RFP, and request that the CPUC support the constituents of the California Deaf and Disabled Telecommunications Program by deleting Section 6.12.4.1 in its entirety.

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**California Public Utilities Commission
Request for Proposal 08PS5800 for California Relay Services 3,
CPUC Document 368851
January 21, 2009**

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6.12.4 Additional Captioned Telephone Service Requirements

6.12.4.1 Disclosure of CA Participation in CTS Conversations

California State law prohibits monitoring, recording or transcribing of telephone conversations unless *all* parties to the conversation give their *express prior consent* or have *received notice* that such monitoring, recording or transcribing is occurring. In the CTS calling process there is a CA participating in the call, potentially without the Voice user's knowledge and possibly without the CTS device user's awareness. While many CTS consumers consider this transparency a significant benefit because of the natural flow of the conversation and some may not have informed their callers that they have a hearing disability, there are nevertheless California laws and regulations that require all parties to be fully informed that the CA is on the call.¹²

In order to assure that the privacy and disclosure requirements of the State of California are consistently applied, the CTS contractor must put in place procedures for a formal disclosure that will be shared with all parties to the conversation, on every call that includes a California-based participant. The disclosure communications for the CTS device user must include a text message transmitted at a speed that may be easily read and understood. The exact final text for these disclosures must be approved by the CPUC prior to commencement of the contract.

Bidders are required to confirm that they understand the above privacy requirements and describe how they propose to satisfy the CA participation disclosure requirement to each of the parties engaged in a CTS conversation. The description shall include:

1. The methodology of delivering the disclosures,
2. A flow chart depicting the insertion and delivery of appropriate text and voice messages to be provided by the CTS Relay Provider, as well as
3. A proposed example of the disclosure messages.

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¹² Relevant laws include but are not limited to California State Penal Code Sections 630-632 and California Public Utilities General Order (GO) 107-B.

Citations to FCC reports, orders, and other documents referred to in this Request to Delete Section 6.12.4.1 from the CRS-3 RFP and which are relevant to the provision of Relay Services:

Relay Services “utilize human CAs who see and hear private conversations while acting as transparent conduits relaying conversations without censorship or monitoring functions.”

Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Report and Order and Request for Comments, CC Dkt. No. 90-571, FCC 91-213 (July 26, 1991) ¶13 (*First TRS Report and Order*).

The FCC interpreted the exception to the rule that CAs never disclose the content of any relayed conversation under Section 705 of the Communications Act, to apply only to “authorized requests by government officials in connection with specific incidents of possible law violations,” and to be “extremely rare.”

Id. at ¶14, n.14.

Since the inception of relay services, businesses and other telephone users have frequently turned away relay calls, believing these calls to be marketing attempts or other calls in which they had no interest.

Telecommunications Relay Services, the Americans with Disabilities Act of 1990, and the Telecommunications Act of 1996, 12 F.C.C.R. 1152, 1169 (Jan. 14, 1997).

“If people with hearing or speech disabilities cannot communicate by telephone, their ability to compete and succeed in today’s job market is threatened. Being able to place a phone call to a prospective employer, to answer an advertisement for a job, to receive training, and to advance one’s career through formal and informal networks depends largely on one’s ability to communicate with many different individuals and entities.”

Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Report and Order and Further Notice of Proposed Rulemaking, CC Dkt. 98-67, FCC 00-56, 15 FCC Rcd 5140 (March 6, 2000) at ¶7.

The FCC explained that “reaching a CA ready to place the relay call is equivalent to getting a dial tone when picking up the phone. Thus, this portion of the call is the first crucial step to making the TRS calling experience functionally equivalent to placing a voice call”

Id. at ¶170.

One of the most important contributions that CTS has made to the ADA promise of functional equivalency is the complete transparency of the CA throughout the call.

Telecommunications Relay Services, and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Declaratory Ruling, CC Docket No. 98-67, FCC 03-190, 18 FCC Rcd 16121 at ¶33 (August 1, 2003) (*Captioned Telephone Declaratory Ruling*).

“The captioned telephone user does not need to dial an 800 or 711 exchange to reach the TRS facility and set up the call, nor is there any interaction with the CA (by either party to the call). . . . Throughout the call the CA is completely transparent and does not participate in the call by voicing any part of the conversation.”

Id. at ¶4.

“Captioned telephone VCO service offers consumers the benefit of operating more like conventional voice telephone service, with direct dialing of the called party’s number and the nearly simultaneous delivery of the actual voice of the called party and written text of what the called party has said as generated by the CA re-voicing the message. The record reflects that it is less intrusive and more natural for the call participants, and that users who become hearing impaired later in life may find it easier to adjust to captioned telephone VCO service than to traditional TRS services. Therefore, captioned telephone VCO service will reach a segment of the population that has traditionally not been well serviced by current TRS options.”

Id. at ¶16.

“Finally, just as VRS [video relay service] has allowed greater functional equivalence in telecommunications for callers who use sign language, we believe that captioned telephone VCO [voice carryover] service will provide greater functional equivalence for those people who prefer VCO TRS and use this technology.”

Id. at ¶16.

Because the CTS CA is transparent, the FCC was able to waive a number of regulations that apply to traditional TTY relay calls, including the requirement for CTS calls to be voiced by a CA of the same gender.

Id. at ¶47.

The FCC explained that CTS is designed so that the user directly calls the other party, with the CA transparent to the call and that “this functionality would be defeated if gender preference had to be accommodated.”

Id. at ¶48.

The FCC agreed with consumers that a proposal that would have allowed CTS CAs to interrupt a telephone conversation would “interfere with the natural flow of the conversation and largely defeat one of the central features of the captioned telephone

VCO service, *i.e.*, that the CA is transparent during the set-up and throughout the call.”

Id. at ¶50.

“Some health professionals have been concerned that contacting patients and discussing health related information via TRS poses a possible violation of the Privacy Rule because a ‘third party,’ the TRS CA, hears the information being discussed as the call is relayed. Some state TRS facilities have informed the FCC that health professionals are requiring all of the facility's CAs to sign disclosure forms before they will use TRS to contact patients with hearing or speech disabilities. We therefore emphasize that all forms of TRS, including ‘traditional’ TTY based relay, Internet Protocol (IP) Relay, Video Relay Service (VRS), and Speech-to-Speech (STS), can be used to facilitate calls between health care professionals and patients without violating HIP[A]A's Privacy Rule.”

Clarification of the Use of Telecommunications Relay Services and HIPAA, FCC Public Notice, DA 04-1716, 19 F.C.C.R. 10677, 10,677-78 (June 14, 2004).

The FCC explained that the “guidepost for the provision of TRS – that the relay service should be ‘functionally equivalent’ to voice telephone service – means, as we have stated, that the CA ‘serves as a *transparent conduit* between two people communicating through disparate modes.’ In other words, the CA’s role is simply to convert typed (or signed) messages into voice messages, and vice versa, so that the parties to the call can communicate back and forth, as any parties to a telephone call would do. It is because of this limited, transparent role of the CA that we have frequently stated that completion of the initial call to the TRS facility, and connecting to a CA, is equivalent to receiving a dial tone.”

Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, CC Dkts. 90-571, 98-67; CG Dkt. 03-123, FCC 04-137, 19 FCC Rcd 12475 (June 30, 2004) at ¶154 (internal citations omitted).

FCC confirmed that CAs are not third parties that can make independent judgments on relayed calls. The FCC explained that the first step for the TRS user, the completion of the outbound call to the TRS provider, is the equivalent to reaching a “dial tone.”

Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities, Report and Order and Order on Reconsideration, CG Dkt. No. 03-123, FCC 05-203 (December 12, 2005) at ¶3, n.12.

FCC confirmed that CAs are not third parties that can make independent judgments on relayed calls. The FCC explained that the first step for the TRS user, the completion of the outbound call to the TRS provider, is the equivalent to reaching a “dial tone.”

Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities, Declaratory Ruling and Further Notice of Proposed Rulemaking, CG Dkt. No. 03-123, FCC 06-57 (May 9, 2006) at ¶10).

“Voice telephone users reach a dial tone almost instantaneously every time they pick up the telephone. For TRS users, the Commission has recognized that reaching a CA ready to handle the call is essentially the same as reaching a dial tone.”

Id. at ¶30.

When the FCC approved an Internet-based form of CTS, it reiterated that “the new service will be provided in a way that is automated and invisible to both parties to the call. For example, presently with captioned telephone service the consumer does not communicate directly with a CA to set up the call; similarly, we expect that IP captioned telephone service should permit the consumer to directly dial the called party and then automatically connect the CA to the calling party to deliver the captions.”

Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities, Internet-based Captioned Telephone Service, Declaratory Ruling, CG Dkt No. 03-123, FCC 06-182 (January 11, 2007) at ¶23.

FCC confirmed that CAs are not third parties that can make independent judgments on relayed calls. The FCC again spoke of the obligation placed on TRS providers to “handle calls consumers choose to make, when they choose to make them, *i.e.*, to be the ‘dial tone’ for a consumer that uses relay to call to a voice telephone user. . .”

Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities, E911 Requirements for IP-Enabled Service Providers, Report and Order and Further Notice of Proposed Rulemaking, CG Dkt. No. 03-123, WC Dkt. No. 05-196, FCC 08-151 (2008) at ¶145.

